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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 974

LEWIS HAYS,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (A NATIONAL BANKING ASSOCIATION), AS ADMINISTRATOR OF THE ESTATE OF WALTER G. ROBINSON, ALSO KNOWN AS W. G. ROBINSON, DECEASED

No. 975

F. PORTEOUS, INDIVIDUALLY, AND F. PORTEOUS AS AGENT,

Petitioner,

vs.

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PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

CHARLES LEDERER,
CHARLES E. JOHNSON,
MARK M. BRAWMAN,
Counsel for Petitioners.

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PETITION FOR WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

Petitioners pray that writs of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Third Appellate District (hereinafter

referred to as District Court of Appeal), entered on October 24, 1945, affirming judgments on demurrers to petitioners' complaints under the Fair Labor Standards Act of 1938.

Opinions Below

The trial court opinions are in the record (R. 3) but not reported. The opinion of the District Court of Appeal (R. 13), is reported in 71 Advance California Appellate Reports (A. C. A.) 410; 162 P. 2d 679. The Supreme Court of the State of California denied petitioners' application for a hearing without opinion (R. 40).

Jurisdiction

The judgment of the District Court of Appeal was entered October 24, 1945 (R. 23). On December 1, 1945 petitioners filed their petition for a hearing in the Supreme Court of the State of California (R. 26). Said petition was denied by said Court on December 20, 1945 (R. 40).

The Rules on Appeal of the California Supreme Court provide that said Court may order a civil cause transferred to itself for hearing and decision within 60 days after the filing of a decision of the District Court of Appeal. A party seeking such hearing must serve and file a petition therefor within 40 days in civil causes after the filing of the decision of the District Court of Appeal. Rule 28(a)(b) Rules on Appeal; 22 C. 2d 20. Petitioners duly complied with said rules.

An application for a writ of certiorari is timely if filed within three months of the date of declining jurisdiction by the State Court of last resort.

Department of Banking v. *Pink*, 317 U. S. 264, 87 L. Ed. 254.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, 28 U. S. C. A. Section 344(b), 8 F. C. A., title 28, Section 344(b).

Questions Presented

1. Whether the State Statutes of Limitations are applicable in actions under the Fair Labor Standards Act to recover unpaid overtime compensation, liquidated damages and attorneys' fees.

2. If State Statutes of Limitations are applicable, what particular statutory limitation is applicable, contract, tort, or statutory liability, to the various items included in the right of recovery?

3. If State Statutes of Limitations are applicable, are they applicable alike to all items of recovery under the Fair Labor Standards Act, or only to some of them?

Statutes Involved

Section 16(b) of the Fair Labor Standards Act of (June 25) 1938, 52 Stat. 1060, 1069, C. 676; 29 U. S. C. A. Section 216(b), 9 F. C. A. title 29, Section 216(b) is printed in the Appendix (p. 11, *infra*).

The material portion of Section 707 of the California Probate Code reads as follows:

> All claims arising upon contract, whether they are due, not due, or contingent, * * * must be filed or presented within the time limited in the notice * * *; and any claim not so filed or presented is barred forever, * * *

The material portion of Section 716 of the California Probate Code reads as follows:

> No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the Clerk or presented to the executor or administrator, * * *

Statement

Petitioners filed complainants alleging they had worked for Respondent's decedent, Walter G. Robinson, in bringing logs from the forest to a mill in California where the logs were cut into lumber; that said lumber was sold thereafter outside the State of California; that petitioners had worked overtime; that said decedent failed, neglected and refused to pay overtime compensation to petitioners, and pray for damages equal to the unpaid overtime compensation, liquidated damages and attorneys fees provided for by the Fair Labor Standards Act (R. 1) (R. 6).

Demurrers were filed to said Complaints (R. 3) (R. 11), Respondent contending that the complaints failed to state causes of action because petitioners had failed to comply with Sections 707 and 716 of the California Probate Code (*supra*). The actions were consolidated for trial.

The trial court sustained the demurrers without leave to amend (R. 5) (R. 12), holding petitioners' claims arose upon contract and therefore Section 707 of the Probate Code applies (R. 3). Judgments denying petitioners any relief were duly entered (R. 6) (R. 12).

On appeal, the cases were again consolidated and the District Court of Appeal affirmed the judgments, holding that claims against an employer's estate for unpaid overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act are based on contracts of employment, or "*quasi ex contractu*" within the California Statutes of Limitations requiring claims arising upon contract to be filed against the estate of a decedent before suing thereon (R. 13).

Reasons for Granting the Writ

1. In holding that the items recoverable under the Fair Labor Standards Act are claims arising upon contract and therefore subject to the state statute of limitations applicable to *contract* claims against the estate of a decedent, the State Appellate Court of last resort decided federal questions of substance not heretofore determined by this court. The State Court has denied petitioners' title, right and privilege, specially set up and claimed by them under the Fair Labor Standards Act. The Action of the State Court is predicated directly upon its interpretation of the federal statute. We know of no decision by this court in which the questions herein presented and heretofore determined by the State Court have been passed upon by this court.

2. The District Court of Appeal in holding as aforesaid decided a federal question of importance in a way which probably conflicts with decisions of this Court.

This Court said in *Brooklyn Savings Bank* v. *O'Neil*, — U. S. —, 89 L. Ed. 876, 883:

"The private-public character of this right is further borne out by an examination of the enforcement provisions of the Act. Although the difficulties of enforcement under the Act were recognized, the Administrator was given limited enforcement powers. Criminal prosecution was available only for wilful violations—difficult to prove. Section 16(a). The Administrator's civil remedy lay by way of suit for an injunction, which by its nature tends to be prospective in operation. No power was vested in the Administrator to bring direct suit to obtain payment of minimum wages left unpaid and to recover damages arising from delay in payment. Sole right to bring such suit was vested in the employee under § 16 (b). Although this right to

sue is compensatory, it is nevertheless an enforcement provision * * *."

3. The holding of the District Court of Appeal conflicts with the holding in *Culver* v. *Bell & Loffland,* 9 Circuit, 146 F. 2d 29. The Federal Court held that the statute of limitations governing actions under the Act is section 338 California Code of Civil Procedure,[1] and said at page 31:

"The view of the Supreme Court in respect of the nature of this statutory claim is indicated in the following passage from its opinion in Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 583, 62 S. Ct. 1216, 1222, 86 L. Ed. 1682: 'Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee. *The wages were specified for him by the statute,* and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under Sections 6 (a) and 7 (a), 29 U. S. C. A. § 206 (a), 207 (a) are compensation, not a penalty or punishment by the Government. Cf. Huntington v. Attrill, 146 U. S. 657, 667, 668, 674, 681, 13 S. Ct. 224, 227, 228, 230, 233, 36 L. Ed. 1123; Cox v. Lykes Brothers, 237 N. Y. 376, 143 N. E. 226. *The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages* (citing cases). (Italics added.)'"

We believe this Court intended the word "compensation" to mean "compensatory damages" for the wrong of retaining the workman's pay, thereby invading the employee's

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[1] California Code Civil Procedure; Sec. 338 (1): "Within 3 years: an action upon a liability created by statute, other than a penalty or forfeiture."

Compare: California Code Civil Procedure Sec. 339 (1): "Within 2 years: An action upon a contract, obligation or liability not founded upon an instrument of writing * * *" and,

California Code Civil Procedure Sec. 337 (1): "Within 4 years: An action upon any contract, obligation or liability founded upon an instrument in writing * * *."

right to a minimum standard of living necessary for health, efficiency and well being, recognized by Congress and protected by the new cause of action conferred upon employees by the Act.

In *Abram* v. *San Joaquin Cotton Oil Co.* (D. C. Cal.) 46 Fed. Supp. 969, 976, the court discussed at length the question here involved and concluded as follows:

" 'The phrase "liability created by statute" means a liability which would not exist but for the statute * * *.' 37 C. J. 783, § 123. 'Where a duty exists only by virtue of a statute, or an obligation to pay is fixed in the Act itself, the obligation is one created by statute.' 16 Cal. Jur. 473. It is true many fine distinctions may be drawn in an attempt to determine the variations of a contractual liability where a statute is involved and a purely statutory liability; yet the conclusion that the obligation of the employer to pay time and one-half for overtime is statutory under the Act, is hardly escapable in view of the purpose and provisions of the Act. Therefore Section 338, Subdivision 1 would apply in an action to recover additional wages under the Act and not Section 339, subdivision 1 (cases cited). (See note 1 supra.)"

In *Lorenzetti* v. *American Trust Co.* (D. C. Cal.), 45 Fed. Supp. 128, at page 139, the court said:

"While the existence of the employer-employee relationship brought plaintiffs and their employers within the Act, and the rate at which they were paid determined the amount of overtime to which they are entitled, there would be no liability, were it not for the Act. A liability created by statute has been defined as one which would not exist but for the statute (cases cited)."

In *Cannon* v. *Miller,* — Wash. —, 155 P. 2d 500, 509, 157 A. L. R. 530, 543, the court, in refusing to follow a

contrary district court holding in *Cunningham* v. *Weyerhaeuser Timber Co.* (D. C. Wash.), 52 Fed. Supp. 654, 657, said:

"With all due respect to the court pronouncing that conclusion, we are unable to agree with that pronouncement in its entirety. We can agree that the action is clearly one for compensation under all the decisions touching that question, but we cannot agree that it rests fundamentally upon an oral contract of employment, rather than upon a 'statutory liability.' It may be conceded, also, that the liability is 'contractual in nature,' in the sense that the law will imply an obligation on the part of the employer to pay his employee the wages specified in the statute. But this does not mean that it is a liability arising out of contract. On the contrary, the obligation of the employer to pay minimum wages is fixed by the statute; the prohibition against excess hours of employment except upon the basis of one and one-half times the regular rate of pay is enjoined by the statute; and the remedy for the breach of either duty is prescribed by the statute. The breach therefore gives rise to 'a liability created by statute.' "

The Supreme Court of Oregon has recently indicated its adherence to the *Culver* and *Cannon* cases (*supra*), *Fullerton* v. *Lamm*, — Ore. —, 163 P. 2d 941, 944.

In *Pace* v. *National Bank of Commerce of Tulsa*, — Okla. —, 125 P. 2d 178, the court held the liability under the Act not to be contractual within the state lien law.

In *Northwestern Yeast Co.* v. *Broutin* (6 Circ.), 133 F. 2d 628, 630, the court held the liability under the Act is based on contract.

In *Loggins* v. *Steel Const. Co.* (5 Circ.), 129 F. 2d 118, the court held the action under the Act was one to recover wages. The court said, however, at page 120:

"But if we could agree with appellant that the suit is not for wages we could not at all agree that it is a suit in quasi contract and within the 10 year prescription of Article 3544. We would be bound to hold that if not a suit for wages it was in tort for damages for a crime or a quasi crime, that is, for the violation of the positive provisions of Section 7 and therefore within the one year prescription of Article 3536."

In a separate concurring opinion (P. 121, *supra*) Judge Sibley said:

"Section 6 is affirmative in form, requiring that 'every employer shall pay to each of his employees • • • wages at the following rates', so that the statute amends every contract for labor which falls under it so as to provide for those rates; and what is due is wages. Section 7 is negative and prohibitory in form, 'No employer shall • • • employ any of his employees' for longer hours than specified 'unless such employee receives compensation' for the excess time at one and a half times the regular rate. It annuls as illegal contracts to the contrary by forbidding their execution unless a 'compensation' is made at a high rate. The high rate is not called wages, but compensation. The same distinction appears in Section 16(b), giving the Federal rights of action, where what is due under Section 6 is again referred to as 'minimum wages' and what ought to have been paid to escape penalization under Section 7 is again called 'overtime compensation'. The doubling of each is called 'liquidated damages'. I am of opinion that an action for unpaid minimum wages is one for wages, and that the damages by doubling them are inci-

dental, as interest would be; so the Louisiana Civil Code Art. 3534, which deals alone with 'action * * * of workmen * * * for the payment of wages', would be applicable. But where, as here, the action is for 'overtime compensation' and damages, due because a prohibitory statute has been violated, it is not one for wages, but for a quasi offense, or tort."

It is now firmly established in this State that Section 707 of the California Probate Code does not include a liability created by statute or a tort claim.

People v. *Hochwender*, 20 C. 2d 181, 184.

Therefore, if this Court is of the opinion that the within actions are not founded upon contract claims, we respectfully submit that the State courts should be reversed and enlightened.

To cite further cases would simply magnify the conflict in the decisions between State and Federal courts and among Federal courts themselves without indicating any clear course of decision. The questions presented by the within Petition are matters of first impression we believe in this court. The annotation in 157 A. L. R. 545 collects the cases on the points here presented, and reveals the incongruous nature of the many decisions already made.

Conclusion

It is respectfully submitted that for the reasons stated this petition for writs of certiorari should be granted and for which we pray.

March, 1946.

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